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Filartiga's Legacy in an Era of Military Privatization

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FILÁRTIGA'S LEGACY IN AN ERA OF MILITARY PRIVATIZATION

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Filártiga v. Peña-Irala[1] famously established the idea that domestic tort suits might be brought under the Alien Tort Claims Act ("ATCA")[2] against those accused of violating human rights norms.[3] But what is the legacy of this case in an era of military privatization? And, in particular, are there available legal responses to what we might call the privatization of torture? These are not hypothetical questions. In the Abu Ghraib prison in Iraq, where detainees were tortured and abused, the individuals involved in the torture included not only members of the military, but contractors hired from the private sector to do the interrogation and translation.[4] If we see the principles of the recent Supreme Court decision in *Rasul v. Bush*[5] applied broadly so that there is U.S. judicial review of government-run detention facilities anywhere in the world,[6] it is not far-fetched to think that we might see an increasing turn to privately run detention facilities using private contractors for supervision and interrogation in order to avoid such constitutional oversight.

Moreover, because many international human rights are framed as rights against state overreaching, the turn to private actors might, at first blush, appear to present a significant problem for legal accountability. For example,

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1. 630 F.2d 876 (2d Cir. 1980).

2. 28 U.S.C. § 1350 (2000).

3. 630 F.2d at 887-89.

4. *See* P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B03 ("Sixteen of the 44 incidents of abuse the Army's latest reports say happened at Abu Ghraib involved private contractors outside the domain of both the U.S. military and the U.S. government.").

5. 542 U.S. 466 (2004).

6. *See id.* At 484-85 (ruling that federal district courts have jurisdiction to hear habeas corpus petitions challenging the detention of foreign nationals in military custody outside the United States). Although the specific litigants in *Rasul* were detained at the U.S. naval base in Guantanamo Bay, Cuba, it remains to be determined whether the holding of *Rasul* applies only to detainees in Guantanamo or to any detainees within U.S. military custody anywhere in the world).

torture is defined as abuse committed by *official* actors,[7] and therefore it might appear that this "state action" requirement would effectively allow human rights abuses committed by private actors to go unredressed. Indeed, this has been precisely the concern raised by scholars about domestic privatization of prisons, schools, and healthcare and welfare programs.[8] Because U.S. constitutional scrutiny traditionally applies only to state actors,[9] privatization has been seen as a way of potentially undermining constitutional oversight.[10]

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7. The Torture Convention defines torture as only acts that are committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention], *available at* http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

8. *See, e.g.*, Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. (forthcoming Dec. 2005) (manuscript at 23-24, on file with author) (contending that prison privatization threatens to erode fundamental public values such as the humane treatment of inmates and the integrity of the incarceration system); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1374-76 (2003) (arguing that privatization limits the reach of constitutional norms and proposing a revival of the nondelegation doctrine as a means of applying these norms to a variety of privatized governmental activities).

9. Having its genesis in an 1883 Supreme Court decision overturning Reconstruction-era civil rights legislation, *see* The Civil Rights Cases, 109 U.S. 3 (1883), the so-called "state action" doctrine rests on the observation that most constitutional commandments proscribe only the conduct of governmental actors. *See, e.g.*, U.S. CONST. amend. XIV ("*No State shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." (emphasis added)). And though scholars frequently have criticized the state action doctrine for attempting to make incoherent distinctions between public and private action, *see, e.g.*, HENRY J. FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA (1968); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985), courts show no sign of discarding the doctrine. *See, e.g.*, NCAA v. Tarkanian, 488 U.S. 179, 191-99 (1988) (holding that the National Collegiate Athletic Association is not a state actor); S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 542-47 (1987) (holding that the U.S. Olympic Committee, a corporation created by federal statute and given control over U.S. participation in the Olympics, as well as exclusive oversight of private amateur sports organizations participating in international competition, is not a state actor); Blum v. Yaretsky, 457 U.S. 991, 1008-09 (1982) (holding that private nursing homes providing long-term care to Medicaid beneficiaries are not state actors, even though they operate under contract with the government and make need determinations authorized by statute); Rendell-Baker v. Kohn, 457 U.S. 830, 837-43 (1982) (holding that private schools are not state actors even though the government contracted with the schools to fulfill its

Yet, it is my perhaps controversial claim that military outsourcing may not, by itself, pose quite as serious an impediment to accountability as it may first seem. To the contrary, human rights abuses by private contractors may actually be *more* readily subject to legal action than abuses by official governmental actors, both through civil suits under the ATCA to redress violations of international human rights law, and through civil and criminal litigation to redress violations of domestic law. Using the Abu Ghraib prison abuse as a case study, this Essay will compare the possible forms of legal accountability for official governmental actors and private contractors, and suggest that the latter are at least as likely, and perhaps more likely, to be held accountable for abuses.

At Abu Ghraib, U.S. military personnel responsible for detention operations abused detainees by forcing them to strip and undergo acts of sexual humiliation, threatening them with dogs, applying electric shocks, subjecting them to mock executions, exposing them to severely cold weather, beating them, nearly suffocating them, and, in some cases, killing them.[11] Private employees operating under contract with the Department of the Interior as interrogators and translators participated in the abuse alongside uniformed military personnel and reportedly directed some of the activities.[12] Such acts clearly violated multiple norms embodied in both international and domestic law.[13]

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statutory obligation to provide education to special-needs students). *But see* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 291 (2001) (holding that a private organization overseeing nearly all public and private high school athletic events is a state actor); West v. Atkins, 487 U.S. 42, 54-58 (1988) (holding that a private doctor treating prisoners pursuant to a contract with a prison is a state actor).

10. *See, e.g.*, Metzger, *supra* note 8, at 1403 (arguing that "[t]he danger is that handing over government programs to private entities will operate to place these programs outside the ambit of constitutional constraints, given the Constitution's inapplicability to 'private' actors"); *see also* Jack M. Beermann, *Privatization and Political Accountability*, 38 FORDHAM URB. L.J. 1507, 1508 (2001).

11. *See* DEP'T OF THE ARMY, INSPECTOR GEN., DETAINEE OPERATIONS INSPECTION 19-20 (2004); FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 13 (2004); LIEUTENANT GEN. ANTHONY R. JONES & MAJOR GEN. GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 68-95 (2004) [hereinafter FAY REPORT]; MAJOR GEN. ANTONIO TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 16-17 (2004) [hereinafter TAGUBA REPORT].

12. FAY REPORT, *supra* note 11, at 130-35; TAGUBA REPORT, *supra* note 11, at 48.

13. Under international law, the abuses could be characterized as torture; cruel, inhuman, or degrading treatment; or war crimes. *See* Rome Statute of the International

Despite the magnitude of these violations, however, the avenues for legal redress, even against the governmental actors, are extremely limited. First, there are few, if any, international, Iraqi, or transnational venues in which the governmental actors or entities could be held criminally or civilly liable. The International Criminal Court ("ICC") has no jurisdiction over Iraq,[14] and, even if it did, under the complementarity principle, any domestic investigation or prosecution would defeat jurisdiction.[15] No other international criminal tribunal has jurisdiction, either. Iraq could theoretically bring a complaint against the United States before the Human Rights Committee, the body charged with monitoring implementation of the International Covenant on Civil and Political Rights ("ICCPR").[16] However,

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Criminal Court, July 17, 1998, arts. 7, 8, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 [hereinafter ICC Statute], *available at* http://www.un.org/law/icc/statute/english/rome_statute(e).pdf; Torture Convention, *supra* note 7, arts. 1, 16; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, *adopted on* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The acts might also constitute crimes against humanity if the abuses were "widespread or systematic" and committed "pursuant to . . . a State or organizational policy." ICC Statute, *supra*, art. 7. In addition, the acts alleged would likely constitute offenses under U.S. law, which directly prohibits the international crimes of torture, *see* 18 U.S.C. §§ 2340-2340B (2000), and war crimes, *see id.* § 2441, and which also criminalizes assault, murder, manslaughter, and maiming. *See, e.g.*, *id.* §§ 111 (assault), 114 (maiming), 1111 (murder), 1112 (manslaughter). Finally, the acts are crimes under Iraqi law, *see* Coalition Provisional Authority Order Number 7, Penal Code, § 3 (June 10, 2003), *available at* http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf (adding prohibition on torture and cruel and inhuman treatment to Iraqi criminal code), and U.S. military law, *see, e.g.*, 10 U.S.C. § 893 (2000) (forbidding "cruelty and maltreatment").

14. Unless the Security Council authorizes a case to proceed, the ICC may exercise jurisdiction only when either the State in which the alleged crime occurred or the State of which the accused is a national has consented to jurisdiction. ICC Statute, *supra* note 13, art. 12(2). Neither the United States nor Iraq has consented to jurisdiction. *See* Rome Statute of the International Criminal Court, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp (last visited Feb. 28, 2006) (listing the ratification status of the ICC Statute).

15. Under the complementarity regime, the ICC may not consider a case if a State with jurisdiction is investigating or prosecuting the case, "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." ICC Statute, *supra* note 13, art. 17(1)(a).

16. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), arts. 28-45, U.N. Doc. A/G316 (Dec. 16, 1976) [hereinafter ICCPR], *available at* http://www.ohchr.org/English/law/pdf/ccpr.pdf. Iraq and the United States have both ratified the ICCPR. *See* Office of the United Nations High Commissioner for Human Rights,

State-to-State complaints in such a venue are extraordinarily rare,[17] and it seems unlikely that, given Iraq's continuing dependence on U.S. support and aid, the Iraqi government would risk souring its relationship with the United States by bringing such a complaint at any point in the near future. A suit in the International Court of Justice, while conceivable, is unlikely for the same reason. With regard to Iraqi courts, although criminal or civil proceedings could theoretically be brought locally, the U.S. Coalition Provisional Authority ("CPA") granted immunity to U.S. and other foreign actors in Iraq.[18] Moreover, diplomatic, head-of-state, and other immunities may apply to current and former officials, though it is of course an open question whether such immunity provisions can effectively shield individuals from accusations of gross human rights violations.[19] Regardless, the Iraqi legal system is likely not stable enough to consider such politically charged cases.[20] Finally, the prospects of a transnational suit in a third-party State under principles of universal jurisdiction are also slim. For example, though a group of Abu Ghraib victims filed an action for war crimes in Germany under that country's universal jurisdiction statute,[21] the statute requires

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International Covenant on Civil and Political Rights New York, 16 DECEMBER 1966 (Jan. 26, 2006), http://www.ohchr.org/english/countries/ratification/4.htm.

17. *See* HARRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 776 (2d ed. 2000) (noting that no interstate complaint has ever been brought under any of the United Nations treaty-body procedures).

18. *See* Coalition Provisional Authority Order Number 17 (Revised), Status of the Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq, § 2(1) (June 27, 2004), *available at* http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf ("Unless provided otherwise herein, the [Multinational Force], the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process.").

19. *See, e.g.*, Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1075-80 (2004) (describing decisions of the British House of Lords concerning the immunity claims of former Chilean leader Augusto Pinochet); *see also* In re Agent Orange Prod. Liab. Litig., Nos. MDL 381, 04-CV-400, 2005 WL 729177, at *76-85 (E.D.N.Y. Mar. 10, 2005) (ruling that contractor immunity defense does not apply to international human rights claims).

20. *See* Robert F. Worth, *2 from Tribunal for Hussein Case Are Assassinated*, N.Y. TIMES, Mar. 2, 2005, at A1 (reporting on the political assassinations of Iraqi judges).

21. *See* Criminal Indictment Against United States Secretary of Defense Donald Rumsfeld et al. for War Crimes Perpetrated Against Iraqi Detainees at Abu Ghraib Detention Center 2003/2004, http://www.ccr-ny.org/v2/legal/september_11th/docs/German_complaint_English_Version.pdf (last visited Mar. 1, 2006) (providing a literal translation of the complaint as drafted by local counsel in Germany).

approval from the chief German prosecutor before jurisdiction can be exercised, and the prosecutor recently declined to move forward with the case,[22] most likely because of its politically sensitive nature.

The best options for holding official actors liable, therefore, are domestic—but even these are not likely to be successful. There has been some accountability within the U.S. military justice system. According to the military, 251 officers and enlisted soldiers have been punished in some way for misconduct related to prisoners.[23] These are mostly fairly low-level actors, however, and their punishments have been relatively light.[24] Indeed, the highest ranking officer convicted in relation to the abuses is only a Captain, and though he was found guilty of kicking detainees and staging the mock execution of a prisoner, he was sentenced to only forty-five days in jail.[25] Moreover, though the military has conducted some informal investigations, there has been almost no accountability at higher levels, despite suggestions that responsibility may lead further up the chain of command.[26] To date, no criminal or civil cases have been brought in U.S. civilian courts, though such options are available at least in theory. Criminal prosecutions could also be initiated under U.S. statutes that criminalize torture[27] and war crimes[28] committed outside the United States. However, in light of the administration's reluctance either to characterize the Abu Ghraib abuse as torture or to set a precedent for prosecutions of war crimes in civilian courts, such prosecutions are unlikely. Indeed, even though the acts of abuse may violate other federal laws for which military personnel can be held responsible, the administration may well be reluctant to prosecute such cases. Civil suits could be brought against U.S. government actors under international law using the ATCA,[29] but such suits have usually been brought against non-citizens, and it is unclear how likely they are to succeed against

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22. *See German Prosecutor Rejects Investigation of Rumsfeld*, L.A. TIMES, Feb. 11, 2005, at A9.

23. *See* Eric Schmitt, *Iraq Abuse Trial Is Again Limited to Lower Ranks*, N.Y. TIMES, Mar. 23, 2006, at A1 (quoting a military spokesperson).

24. *See, e.g.*, *id.* (describing some of the cases and punishments received).

25. *See id.*

26. *See id.* (reporting that defense efforts to "point a finger of responsibility at higher-ranking officers" have repeatedly failed and observing that, other than a few reprimands, "there is no indication that . . . senior-level officers and civilian officials will ever be held accountable for the detainee abuses that took place in Iraq and Afghanistan").

27. 18 U.S.C. §§ 2340-2340B (2000).

28. *Id.* § 2441.

29. 28 U.S.C. § 1350 (2000).

U.S. military personnel. Indeed, although an argument could be made that immunities should not apply to governmental officials accused of severe human rights abuses,[30] a claim of immunity remains a potentially effective method to block a civil action.[31] Avenues of relief under domestic law are similarly confined. It is at best uncertain whether the Constitution applies extraterritorially,[32] and though the Federal Tort Claims Act ("FTCA") may waive sovereign immunity for some domestic tort suits,[33] such waiver is quite limited.[34]

Viewed against this backdrop, the possibility of legal accountability for private actors, either individuals or corporations, does not seem significantly worse. While there are added hurdles for such actors in some settings, in others there is actually a greater likelihood of legal accountability. Certainly there is, again, no international court or tribunal that would be likely to exercise jurisdiction, but, as discussed above, that is no different than for governmental actors. Similarly, Iraqi courts are an unlikely venue both because of the possible applicability of the CPA immunity provision[35] and because of the undeveloped state of the current Iraqi legal system—but these courts would be equally unavailable for proceedings against governmental actors.

Domestically, the military justice system is not available to try the non-state actors because the U.S. Supreme Court has prohibited military trials of

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30. *See supra* note 19 and accompanying text.

31. For example, at the highest levels, head-of-state and diplomatic immunities might apply. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 41 I.L.M. 536, para. 78 (Feb. 14, 2002), *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF (setting forth a judgment of the International Court of Justice, quashing an arrest warrant on immunity grounds).

32. *See* Rasul v. Bush, 542 U.S. 466, 484-85 (2004) (ruling that federal courts have habeas corpus jurisdiction over suits brought by detainees held at the U.S. Naval Base at Guantanamo Bay, Cuba, but leaving ambiguous whether this jurisdiction extends to U.S. detention facilities elsewhere in the world); United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (suggesting that the protections of the Fourth Amendment apply only "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"); Johnson v. Eisentrager, 339 U.S. 763, 795 (1950) (Black, J., dissenting) ("Does a prisoner's right to test legality of a sentence then depend on where the Government chooses to imprison him?").

33. 28 U.S.C. § 1346(b).

34. For example, suits arising from any discretionary function are barred, even if the government officials in question abused their discretion. *See id.* § 2680(a).

35. *See supra* note 18 and accompanying text.

U.S. civilians absent a declaration of war.[36] Yet, domestic criminal prosecutions in civilian courts may be more likely than such prosecutions of governmental actors. To be sure, prosecutions under the War Crimes Act or the statute criminalizing extraterritorial torture[37] are unlikely for the same reasons that prosecutions of governmental actors are unlikely under these statutes: because the administration appears reluctant to characterize the abuses at Abu Ghraib as torture or to set a precedent for domestic civilian prosecution under these provisions. Moreover, prosecutors applying these statutes would need to show a sufficient nexus between the contractors and the governmental actors to establish state action (though this may not be a particularly onerous burden in this context).[38] Nevertheless, prosecution under ordinary domestic criminal law, which forbids the acts committed at Abu Ghraib even if not characterizing them as torture, is a real possibility. The Military Extraterritorial Jurisdiction Act, which was enacted precisely because U.S. military courts are not an option for private actors, specifically allows criminal charges to be brought against U.S. contractors working for the Defense Department.[39] Of course, because many of the contractors in Iraq are operating under agreements with the CIA or with the Department of Interior,[40] the statute would not apply in all cases. The USA PATRIOT Act, however, closes this loophole to some extent by expanding the United States' special maritime and territorial jurisdiction ("SMTJ") to include facilities run by the United States overseas.[41] Thus, a prosecutor might bring charges against private actors mistreating detainees overseas if the abuse constitutes a

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36. *See* Kinsella v. United States *ex rel*. Singleton, 361 U.S. 234, 248-49 (1960) (prohibiting military jurisdiction over civilian dependents in time of peace, regardless of whether the offense was capital or noncapital); Grisham v. Hagan, 361 U.S. 278, 280 (1960) (holding that civilian employees committing capital offenses are not amenable to military jurisdiction); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 283-84 (1960) (expanding *Grisham* to include noncapital offenses); Reid v. Covert, 354 U.S. 1, 40-41 (1957) (holding that civilians in time of peace are not triable by court-martial for capital offenses).

37. *See supra* note 13.

38. *See infra* note 46 and accompanying text.

39. *See* Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261-3267 (2000).

40. *See, e.g.*, *Agreement Between the Department of the Interior and CACI Premier Technology, Inc.*, No. NBCHA010005 (2004), *available at* http://www.publicintegrity.org/docs/wow/CACI_ordersAll.pdf (last visited Aug. 18, 2005) (agreement to supply military interrogators).

41. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, tit. VIII, § 804, 115 Stat. 272, 377 (2001) (amending 18 U.S.C. § 7).

crime within the SMTJ as long as the crime was committed within a U.S. facility.[42] In fact, one private contractor who was working for the CIA and was implicated in detainee abuse in Afghanistan has been indicted in the United States for assault committed within the SMTJ.[43]

On the civil side, a number of possibilities also exist. Civil suits under the ATCA already have been filed against the contractors implicated at Abu Ghraib for violations of international law.[44] Because they have been brought against private parties, these suits will need to demonstrate a link to state action, at least with respect to the claims of torture and other norms that require such a link.[45] However, in the Abu Ghraib setting such a link may not be so difficult to establish because the private contractors were working in a facility actually run by the U.S. government. To be sure, there is some ambiguity as to whether the uniformed personnel were taking orders from the contractors or vice versa. Yet, under even the narrow construction of the state action doctrine found in U.S. constitutional law, or, alternatively, under a theory of joint criminal action, the activities at Abu Ghraib would probably be actionable. If the prison were managed entirely by private contractors, showing a nexus to the state would be more difficult. But while U.S. courts have imported the state action doctrine from U.S. constitutional law into ATCA cases, they have applied the doctrine in a much broader way than they have in ordinary domestic suits.[46] International courts have also tended to apply theories of complicity, such as joint criminal enterprise, quite

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42. *See id.*

43. *See* Farah Stockman, *CIA Contractor Is Charged in Beating of Afghan Detainee*, BOSTON GLOBE, June 18, 2004, at A1.

44. *See* T. Christian Miller, *Ex-Detainees Sue 2 U.S. Contractors: Employees of Titan and CACI Are Accused of Torturing Prisoners. Lawyers Say the Action Is Based on a Military Report on Abuse*, L.A. TIMES, June 10, 2004, at A9.

45. For example, as previously noted, *see supra* note 7, the Torture Convention defines torture as only acts that are committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Torture Convention, *supra* note 7. An ATCA suit based on an allegation of torture would therefore also need to satisfy this state action requirement in order to establish a violation of the law of nations. 28 U.S.C. § 1350 (2000) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, *committed in violation of the law of nations* or a treaty of the United States." (emphasis added)).

46. *See, e.g.*, Abdullahi v. Pfizer, Inc., No. 01 CIV. 8118, 2002 WL 31082956, at *4-6 (S.D.N.Y. Sept. 17, 2002) (ruling that an ATCA complaint alleged sufficient complicity between governmental and private actors to survive a motion to dismiss), *vacated in part by* 77 F. App'x 48 (2d Cir. 2003); Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386(KMW), 2002 WL 319887, at *13-14 (S.D.N.Y. Feb. 28, 2002) (same).

broadly.[47] Thus, in the international context, even where private actors wield considerable discretion to manage detention facilities, it is not nearly as difficult to demonstrate a sufficient link to the State.

Finally, an under-explored avenue is the extent to which ordinary municipal law, such as tort law, might provide norms that could be used to address human rights abuses like those committed at Abu Ghraib. For example, assault or battery in the law of many countries would cover the same conduct that would give rise to a torture claim. In many suits brought under the ATCA in the United States, plaintiffs assert state law tort claims under a theory of supplemental jurisdiction.[48] But such claims might also be asserted directly through forms of transnational tort litigation.[49]

A significant advantage of these suits against private contractors, whether under international law and the ATCA or under municipal law, is that an argument can be made that governmental immunities do not apply. To be sure, for cases brought in the United States, contractors might argue that, in addition to immunities arguably granted by the CPA, they should get the benefit of the so-called "government contractor defense," the immunity given to governmental actors under the FTCA.[50] There is, however, at least a plausible argument that immunity should not apply to these types of claims. The case that establishes the government contractor defense, *Boyle v. United Technologies Corp.*,[51] involved a products liability claim (not a claim

47. *See, e.g.*, Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 79 (2005) (noting the trend and arguing that such broad use of complicity theories "if not limited appropriately, [has] the potential to lapse into forms of guilt by association, thereby undermining the legitimacy and the ultimate effectiveness of international criminal law").

48. *See, e.g.*, Xuncax v. Gramajo, 886 F. Supp. 162, 195 (D. Mass. 1995) (asserting supplemental jurisdiction over municipal tort claims appended to human rights claims brought under the ATCA and the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2000))).

49. *See generally* TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION (Craig Scott ed., 2001) (collecting essays on using tort law to advance a transnational human rights agenda).

50. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 511-12 (1988) (ruling that government contractors can claim immunity from civil suit under the FTCA's provision barring "'[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused'" (alterations in original) (quoting 28 U.S.C. § 2680(a))).

51. 487 U.S. 500 (1988).

regarding a services contract) and also limited the defense to circumstances in which the government set the design specifications with reasonable precision, leaving little discretion to the contractor.[52] At least one court has concluded that the defense does not apply to international human rights claims.[53] Even for domestic claims arising from tort and contract, an argument could be made that, because the government contracts for services at Abu Ghraib prison were not particularly specific, the contractor should not be able to invoke immunity.[54] In any event, it is clear that when the government privatizes military functions, individuals seeking redress may actually have more avenues to pursue legal accountability than when the government performs military functions directly.

Military privatization thus may not jeopardize the possibility of holding human rights abusers accountable for their actions as much as it may at first seem. To be sure, part of the reason for privatization's relatively limited impact is no cause for celebration. It is because the baseline of accountability for official governmental actors is quite low—that is, it is relatively unlikely that any court will hold military actors accountable for torture or other abuses.[55] And the viability of legal claims against private military contractors who commit atrocities depends in part on the continued existence of the ATCA, a state of affairs that is by no means certain.[56] Congress could choose to repeal the statute, and in the wake of *Sosa v. Alvarez-Machain*,[57] courts could construe the statute quite narrowly.[58] But even if the courts define the

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52. *See id.* at 512-13.

53. *See In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 7, 90-99 (E.D.N.Y. 2005).

54. *Cf.* Jama v. Esmor Corr. Servs., Inc., 334 F. Supp. 2d 662, 688-89 (D.N.J. 2004) (rejecting the government contractor defense for tort claims against a private prison management corporation because the contract did not specifically require or approve of the corporation's practices that led to abuse).

55. *See supra* notes 14-34 and accompanying text.

56. For example, the International Chamber of Commerce has lobbied Congress to repeal the statute. *See, e.g.*, Conal Walsh & Oliver Morgan, *UK Firms Face Lawsuits as Watts Quits ICC Post: Companies Left Fighting US Human Rights Act After Former Shell Chairman Resigns*, OBSERVER, Apr. 4, 2004, at 2, *available at* http://www.guardian.co.uk/print/0,3858,4894566-110373,00.html (referring to such efforts).

57. 542 U.S. 692 (2004).

58. *Sosa* limited the scope of cognizable ATCA claims to those that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725. Needless to say, this formulation leaves open a tremendous amount of room for future interpretation and elaboration, and some courts may decide to construe the range of permissible claims quite narrowly indeed.

substantive categories of international human rights claims subject to suit under the ATCA in a limited way, courts thus far have seemed willing to view the "state action" question under international law more broadly than they do domestically.[59] It will be the task of practitioners to convince them that they should continue to do so. And, more importantly, transnational tort suits brought under domestic laws remain an under-explored means of holding human rights abusers accountable. Such suits against private military contractors will be necessary to continue building on *Filártiga*'s legacy.

59. *See supra* note 46 and accompanying text.